

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

74-1875

To be argued by
HARRY C. BATCHELDER, JR.

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 74-1875

UNITED STATES OF AMERICA,

B
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Appellee,

—v.—

AARON KEREKES,

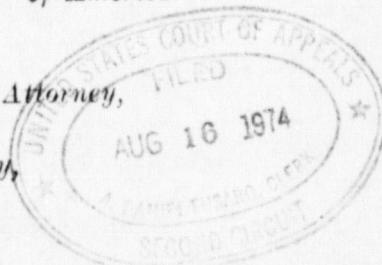
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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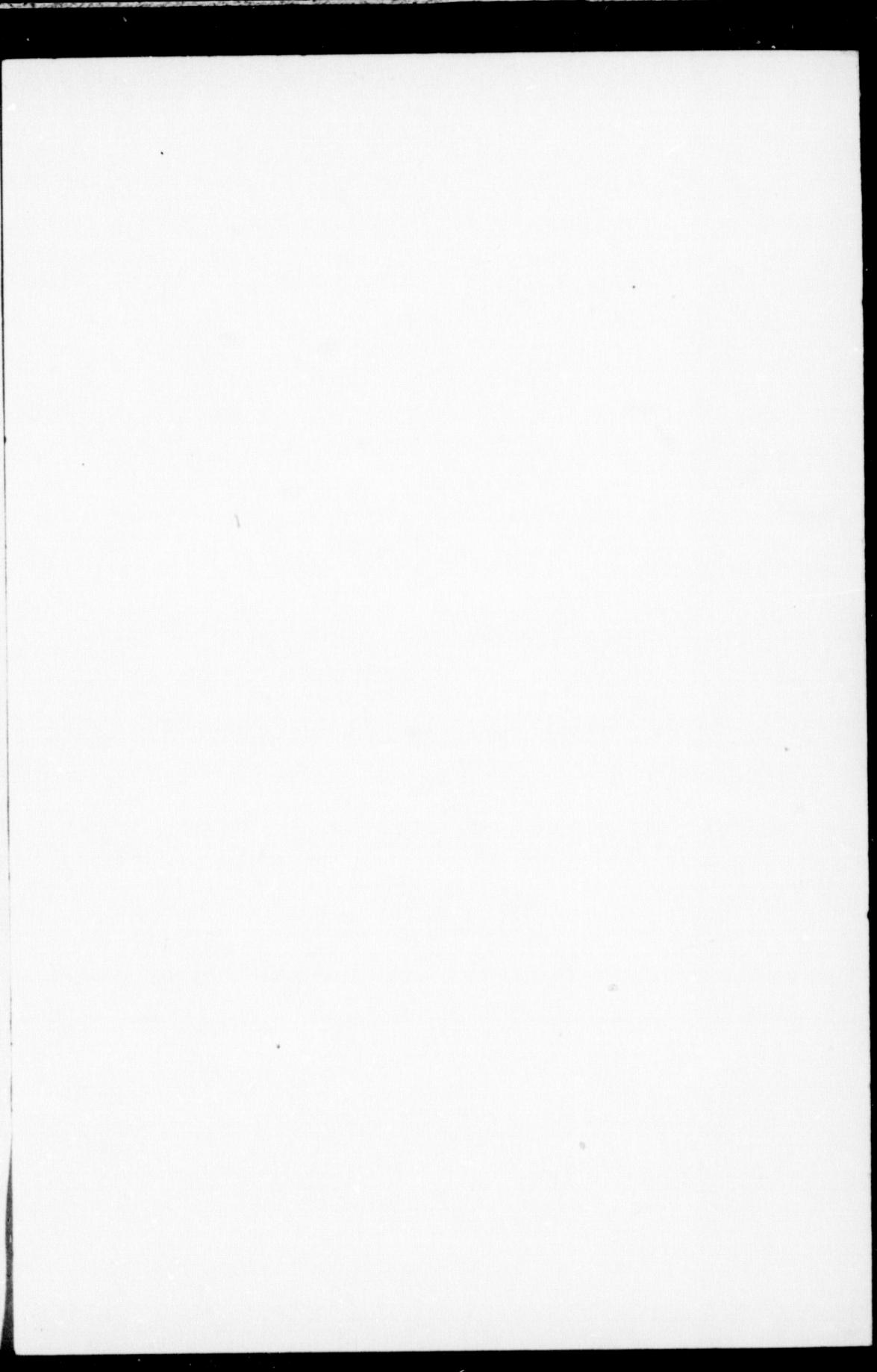
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—v.—

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Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Aaron Kerekes appeals from a judgment of conviction entered on May 22, 1974 in the United States District Court for the Southern District of New York.

Indictment 74 Cr. 103, filed on January 31, 1974, contained three counts. Count One charged Nathan Joseph * and Aaron Kerekes and others unknown with conspiracy to distribute approximately 19.8 pounds of hashish in violation of Title 21, United States Code, Section 846. Count Two charged both defendants with distribution and possession with intent to distribute approximately 19.8 pounds of hashish in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A), and Title 18,

* Nathan Joseph failed to appear for trial and was subsequently indicted as a fugitive (Indictment 74 Cr. 374).

United States Code, Section 2. Count Three charged Nathan Joseph with possession with intent to distribute approximately 25 pounds of hashish in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

On April 2, 1974, trial commenced against Aaron Kerekes before District Judge Robert J. Ward and a jury. Defendant Kerekes was found guilty on Counts One and Two on April 4, 1974. On May 22, 1974, Kerekes was sentenced to fifteen years imprisonment on each count, to be served concurrently, and was committed for a study pursuant to Title 18, United States Code, Section 4208.

Statement of Facts

A. The Government's Case

Shubavel Tavlin, a paid government informant, was introduced to defendant Aaron Kerekes on the evening of August 28, 1973 at the apartment of David Friedman, a mutual acquaintance. Kerekes told Tavlin that he had a large quantity of hashish for sale (Tr. 12)* and that he wanted to dispose of the drugs before September 1, 1973, when the revised New York narcotics law would take effect (Tr. 86). Negotiations continued in Hebrew (Tr. 19), until Tavlin agreed to purchase 20 pounds of hashish at \$1,000 per pound on behalf of an unnamed buyer. Kerekes gave Tavlin a sample which proved to be 1.04 grams of hashish (Tr. 95), and the two agreed to meet the following day (Tr. 12).

On August 29, 1973, Tavlin turned the sample over to federal agents and returned under surveillance to Friedman's apartment, 41 West 64th Street, at 3:00 p.m. Tavlin

* Parenthetical references are to minutes of the trial transcript.

told Kerekes that he had a "millionaire" buyer who would deal through Tavlin alone. Kerekes related that his "boss" insisted on dealing anonymously through Kerekes and would require payment in advance. Tavlin refused (Tr. 13).

Tavlin and Kerekes went to The Ginger Man, an outdoor cafe next door to the apartment building, where discussions continued for about twenty minutes. Kerekes related that the hashish was at the Spring Street apartment of an artist, which had a closed circuit television monitoring device to guard the entrance. When Kerekes alluded to rumors that Tavlin might be working for the Government, Tavlin became impatient and threatened to break off negotiations (Tr. 14).

Defendant Kerekes then went into the restaurant to make a telephone call. A surveillance agent in the cafe observed Kerekes dial a number beginning with the digits "92" and ending with "2665", and could make out a conversation in English and a foreign language (Tr. 172-173). Kerekes returned to the table and asked Tavlin where the money was (Tr. 14).

Tavlin left The Ginger Man and returned to federal headquarters, where \$20,000 in recorded \$100 bills had been put in an attache case and placed in the trunk of a government car (Tr. 97). Tavlin phoned and then returned to the 64th Street area with surveillance agents.

Upon rejoining Kerekes, Tavlin offered to show him the money, opened the trunk, and satisfied defendant Kerekes that he had the sum agreed upon. Tavlin once again refused to make an advance payment and insisted on a simultaneous exchange. When Kerekes said he would have to make a phone call, Tavlin said he would meet him later, and returned to federal headquarters (Tr. 15).

At about 7:45 that evening, Tavlin telephoned the defendant and advised that he would meet Kerekes on 64th Street and drive him downtown to arrange the deal. Tavlin picked up Kerekes about 8:00 p.m. and drove to 139 Spring Street, parking across the street from that address. For the third time, Tavlin refused to pay before receiving the hashish. Kerekes left Tavlin in the car, crossed the street and rang a doorbell at 139 Spring Street. A man appeared in a fourth floor window and was observed by both Tavlin and a surveillance agent to call down to Kerekes (Tr. 16, 139-140). Tavlin heard the voice from the fourth floor shout "Aaron, is that you?" in Hebrew, and Kerekes answered affirmatively (Tr. 16).

The defendant entered the building and returned to the car four or five minutes later to demand payment. Tavlin once again opened the trunk and showed Kerekes the money. Kerekes then went back into 139 Spring Street, reappearing at the door moments later with a cardboard box and a second person who hid his face from view. Tavlin called to Kerekes to come over to the car but the defendant declined and asked that Tavlin cross the street to meet him in the doorway. As Tavlin got out of the car to open the trunk, the second person observed Special Agent Allen approach the doorway (Tr. 147), and ran back into the building (Tr. 50). Kerekes hurried to the automobile and put the carton in the trunk. Several agents then arrested Kerekes (Tr. 17). The box contained 8,939.4 grams of hashish (Tr. 102).

During Kerekes' presence in the entryway to 139 Spring Street, Special Agent Allen observed an arm or a leg of the second person in the doorway and tried to enter the building. An individual later identified as Nathan Joseph, wearing the same color clothing as this second person (Tr. 158), appeared in the hallway moments later for five to ten seconds, as if to see if Special Agent Allen was still there (Tr. 147-151).

After arresting Kerekes the agents gained entry to the building with some difficulty, heard scuffling upstairs, and quickly arrested several persons on the roof and in Nathan Joseph's fourth floor apartment. Subsequent search of those premises revealed a telephone, number 925-2665, marijuana, hashish pipes, and artist's paraphenalia (Tr. 104-6, 178, 259).

Minutes after Kerekes' arrest, Special Agent Beckner approached the defendant and asked him several questions. No witness was able to testify that Kerekes had been advised of his constitutional rights.* In response, Kerekes indicated he picked up the box in the hallway where it had been left because he had telephoned before coming downtown. The defendant told Beckner that the number he had called was that marked "Nathan 925-2665" on a matchbook in his left rear pocket (Tr. 258-260).**

Sometime later, Agent Yarbrough urged Kerekes to cooperate with the Government and identify his source of narcotics. According to Yarbrough, Kerekes responded, "How do I know when I give up my source and give you this information you are going to turn around and not do anything for me?" (Tr. 199). The defendant told Yarbrough that he knew all about the hashish situation, but also indicated that he was afraid to cooperate (Tr. 201).

Prior to arraignment on August 30, 1973, Kerekes was interviewed by an Assistant United States Attorney in the presence of Special Agent Yarbrough. Yarbrough testified that the defendant was properly advised of his constitutional rights and refused to identify the other person in the 41 West 64th Street apartment which he gave as his ad-

* Special Agent Smith, who had custody of the defendant for two or three minutes after arrest, was unavailable at trial. (Tr. 168).

** Nathan Joseph was arrested on September 4, 1973 (Tr. 182-183).

dress, for fear of implicating that individual (Tr. 204-205). Kerekes denied having possession of the box at the time of arrest, insisting that he had walked over to 139 Spring Street, picked up the package, walked back to the car and placed it in the trunk before being apprehended (Tr. 179-182).

B. The Defense Case

Defendant Kerekes denied ever meeting Tavlin on August 28, 1973 (Tr. 240). Kerekes said that on August 29, he was first introduced to Tavlin sometime after 4:00 p.m. at David Friedman's apartment, a gathering place for Israeli-Americans. The two discussed gambling (Tr. 208-11).

According to Kerekes, Friedman, Tavlin and Kerekes then went to The Ginger Man for about 20 minutes, where Tavlin allegedly bragged of his sexual exploits and asked Kerekes to procure young girls for him (Tr. 230). The trio returned to the apartment because Friedman expected guests. When Tavlin indicated he would be driving to Long Island, Kerekes asked for a ride to Queens and agreed to wait until 7:30. Tavlin had to leave temporarily but arranged to return to pick up Kerekes (Tr. 213).

Twenty minutes later, Tavlin reappeared at the apartment, remarking that his appointment had been cancelled. At Tavlin's suggestion, he and Kerekes returned to The Ginger Man, but Tavlin seemed in a hurry. Kerekes reminded Tavlin of their arrangement and called his mother from the restaurant (Tr. 240). As he was leaving for the second time, Tavlin boasted of his gambling ability and coaxed Kerekes down the block to see a large amount of money in the trunk of his car (Tr. 213-215).

At about 8:00 p.m. Tavlin came to the apartment a third time and picked up Kerekes. The two drove east until Tavlin turned back, explaining that he had to make a de-

tour downtown. Upon arrival at Spring Street, Tavlin asked Kerekes to cross the street, ring the unlabeled doorbell at 139, and take the package which someone would bring him. Tavlin indicated that the box would contain ovenware he had sold to a dissatisfied customer (Tr. 221), and that he was reluctant to leave the car with the money in the trunk (Tr. 216-217).

Defendant Kerekes rang the bell without result, but entered the building as someone else was leaving. He remained in the lobby five to seven minutes. When no one appeared, he returned to the car and reported this to Tavlin, who then searched for something on the dashboard and in the trunk of the car before producing a notebook from his shirt pocket. Tavlin asked Kerekes to try again and gave him a telephone number to call from a booth on the corner. Kerekes wrote the name and number on a matchbook and went back across the street. The door to 139 was ajar; Kerekes reentered to find a carton on the floor and to see someone disappear into the elevator.

Kerekes gestured to Tavlin to indicate the box was there, and Tavlin motioned to him to bring it to the car. Kerekes picked up the carton and carried it to the trunk without ever looking inside or realizing what it contained. He was then arrested (Tr. 217-222).

Kerekes testified that he volunteered to the agents that he did not know what was in the package, and in response to a question told them that he merely picked up the box in the lobby. Agents then searched Kerekes and found the matchbook with the telephone number, which he insisted was given to him to call upstairs (Tr. 223).

ARGUMENT

POINT I

Evidence of the appellant's post-arrest statements was properly received.

A. The statements were introduced by the defense as an element of litigation strategy.

The question of the admissibility of Kerekes' post arrest statements was first raised by the prosecutor in a colloquy out of the hearing of the jury (Tr. 167-170). Before calling Agent Beckner who interrogated the defendant at the scene, the Government explained that the agent who had immediate custody of Kerekes was unavailable at trial, and no witness could testify that the defendant had been advised of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966).

The first mention of these statements before the jury was after this exchange, on cross-examination of Special Agent Yarbrough (Tr. 188 *et seq.*). In order to bolster Kerekes' claim of ignorance, defense counsel had inquired of previous Government witnesses whether the defendant had been asked at the scene if he knew the contents of the box. Yarbrough was the first witness to have been present during the interrogation (Tr. 117, 136, 164).

When Yarbrough testified in response to defense counsel's inquiries that he had participated in the questioning, defense counsel insisted that the Agent's written report of Kerekes' post arrest statements be read to the jury. The Government objected to partial admission of the report and the Court ruled that if admitted in part, the entire report could be read to the jury:

The Court: Understand that to be the nature of the ruling. Mr. Lenefsky, I leave the choice to you.

Mr. Lenefsky [defense counsel]: I made my choice. He can show it to the jury, the entire report (Tr. 190).

At the Court's direction and defense counsel's insistence, the witness then read paragraph 7 of his written report, containing Kerekes' post arrest statements (Tr. 191-2).

The cross-examination continued to emphasize admissions of the defendant not yet before the jury. Defense counsel asked Yarbrough whether Kerekes had said anything to indicate that he knew the box contained hashish, whether Kerekes had said anything "derogatory" to his previous plea of innocence (Tr. 196), what Kerekes had responded to a request to give up his source (Tr. 179, 201), and finally, over Government objection, whether the defendant had said he knew all about the hashish situation (Tr. 201).

At the close of the defendant's evidence, the Government called Special Agent Beckner in rebuttal to relate the questions asked at the arrest scene and the defendant's answers (Tr. 258-259).

Counsel's deliberate litigation strategy to elicit the content of the defendant's post arrest statements precludes an appellate claim that the statements were obtained in violation of *Miranda*. *Henry v. Mississippi*, 379 U.S. 443, 451 (1965). By stressing that no arresting officer had asked Kerekes if he knew what was in the carton and bringing out the exact wording used in the agent's report to describe the defendant's statements, defense strategy was to buttress its single theory of the case: that Government witnesses had framed Kerekes e.g., (Tr. 7-10, 61-2, 83, 117, 136, 164, 222, 261, 262, 274, 279, 281-2). No less than *United States ex rel. Cruz v. LaValle*, 448 F.2d 671 (2d Cir. 1971),

cert. denied, 406 U.S. 958 (1972), "this is as plain a case as can be imagined of a defense counsel's deliberate choice, in pursuing a well-thought-out trial strategy," *id.* at 676, to bypass one defense in favor of another. The consciousness of the decision to pursue a line of questioning to bring out Kerekes' statements is evidenced by an exchange between counsel and the Court which is even more direct than that in *LaVallee*. Compare (Tr. 189-192) with 448 F.2d at 677.

This is not merely a deliberate choice to forego a *Miranda* objection when available as a defensive measure. The record clearly shows an affirmative use of the defendant's statements in an effort to discredit government witnesses and exculpate himself, and he should not be permitted to change his position on appeal, absent a showing of new circumstances unknown to him at the time of trial. *United States ex rel. Terry v. Henderson*, 462 F.2d 1125, 1130 (2d Cir. 1972).

B. The defense failed to make a proper *Miranda* objection at trial.

When the Government first brought up the problem outside the hearing of the jury, defense counsel suggested that there might be a *Miranda* issue (Tr. 169). Later, however, the defense took the initiative by using the post-arrest statements in the manner described above.

Needless to say, the defendant did not object to the admission of evidence and testimony which he himself introduced. In general, failure to make a proper objection before the trial court to the admission of challenged evidence forecloses review of the asserted error. *United States v. Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). This is also the law for errors alleged under *Miranda v. Arizona*. *United States v. Purin*, 486 F.2d 1363, 1368 (2d Cir. 1973); *United States v. Bell*, 464 F.2d 667, 674 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972).

POINT II

The evidence was sufficient as a matter of law to support a finding of membership in the conspiracy charged.

The indictment charged in Count One that Aaron Kerekes, Nathan Joseph, and other persons unknown to the Grand Jury conspired to distribute narcotic drugs. Kerekes appears to argue that the proof was insufficient to identify with precision the identity of any co-conspirator and thus that Kerekes could not be found guilty of conspiracy as a matter of law. This argument is frivolous.

The Government's evidence showed that Kerekes offered to sell Tavlin hashish, that he agreed to a price and quantity, and that he gave Tavlin a sample. Kerekes said he had a confederate who would deal only through him and that the hashish was stored at an artist's Spring Street apartment which was protected by a television camera. The defendant interrupted negotiations for the sale of drugs to make two phone calls, at least one to a number identical to that of Nathan Joseph except for one unknown digit. He demanded advance payment for narcotics numerous times, and twice viewed \$20,000 purchase money in the trunk of a car to make sure it was available. Kerekes drove with Tavlin to 139 Spring Street, rang the bell and responded when someone called to him from a fourth floor window. He entered the building, returned to re-examine the money, went back into the building and reappeared carrying a box containing twenty pounds of hashish. He was accompanied by a second person who hid his face but was identified from his clothing as Nathan Joseph, an occupant of the fourth floor apartment. The defendant hesitated in the doorway, motioning to Tavlin to come get the box. His companion fled as Tavlin got out of the car and a federal agent approached the building. Kerekes ran

across the street and dropped the carton in the trunk of the car. The defendant was carrying a matchbook with Nathan Joseph's name and telephone number. Search of Nathan Joseph's apartment revealed marijuana, devices for the use of hashish, and artists' paraphenalia.

The facts outlined above are certainly sufficient to have allowed the jury to conclude beyond a reasonable doubt that Aaron Kerekes had agreed with a person or persons located at 139 Spring Street to distribute narcotic drugs. Their exact identities need not be proven and a defendant may be indicted and convicted of conspiracy even if the names of co-conspirators are unknown. *Rogers v. United States*, 340 U.S. 367, 375 and n.20 (1951). Even were the rule of law otherwise, the calls to Nathan Joseph's number, Kerekes' description of his principal as an artist and the artist's materials found in Joseph's apartment, Kerekes' possession of Joseph's phone number, the figure shouting Kerekes' name from Joseph's apartment, Nathan Joseph's appearance with Kerekes and the hashish in the doorway and his subsequent flight, all suggest the inference that at least one of those co-conspirators was Nathan Joseph.

Appellant erroneously compares his case to the situation where all named co-conspirators have been acquitted and "persons unknown" was not specified in the indictment, thereby reducing the conspiracy charged to a lone defendant, citing *United States v. Suba*, 227 F. Supp. 445 (W.D. Pa. 1964); *Grove v. United States*, 3 F.2d 965, 967 (4th Cir. 1925) and other cases which do not treat this question. Unlike *Grove*, Kerekes' named co-conspirator remains under indictment and has fled to avoid prosecution. As in *Grove*, "persons unknown" was specified in the indictment and the Court's charge to the jury (Tr. 299, 303). The inference that others participated in the conspiracy was allowable in view of the nature of the narcotics trade, the bulk quantity of hashish involved, the facts that several

persons fled to other parts of the building, that Nathan Joseph himself successfully disappeared from the premises and evaded arrest until September 4 (Tr. 125, 182-3), and the possibility that others may have done likewise. A conspiracy involving two or more persons was adequately charged in the indictment and proven at trial.

Thus, the question of the existence of a conspiracy and Aaron Kerekes' membership therein was properly submitted to the jury and decided by them beyond a reasonable doubt based upon sufficient evidence.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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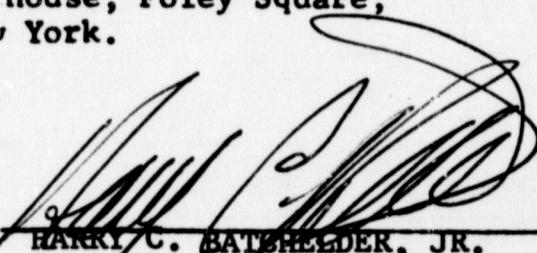
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HARRY C. BATCHELDER, JR., being duly sworn,
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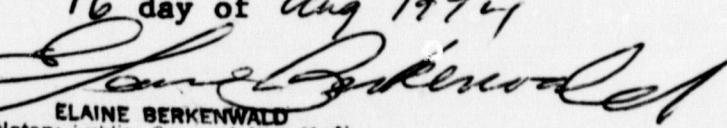
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HARRY C. BATCHELDER, JR.
Special Assistant United States Attorney

Sworn to before me this

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ELAINE BERKENWALD
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